R.D. #0003-06
Pittstown, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

COUNTRY ARCH CARE CENTER
Employer-Petitioner

and **CASE 22-RM-746**

DISTRICT 6 INTERNATIONAL UNION OF INDUSTRIAL SERVICE, TRANSPORT AND HEALTH EMPLOYEES[1]
Union

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION:

As described more fully below, I find that there is no bar to conducting an election in this matter. In this regard, I find that there is no contract bar and that the petition, even though prematurely filed, should not be dismissed.

The Employer-Petitioner, herein also referred to as the Employer, filed a petition under Section 9(c) of the National Labor Relations Act, covering a unit of all full-time and regular part-time nurse's aides, dietary workers, housekeeping employees, laundry employees and activities aides who work at least 20 hours or more per week, employed at its Pittstown, New Jersey facility, excluding outside sales representatives, executive, administrative, managerial and confidential employees, registered nurses, licensed practical nurses, office clerical employees, seasonal

[1] The name of the Union appears as amended at the hearing.

employees, temporary employees, casual on-call personnel, cooks, maintenance employees, managers, guards and supervisors as defined in the Act and all other employees. The Union was permitted to intervene in this proceeding based on its asserted collective bargaining relationship with the Employer.[2]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record,[3] I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. For the reasons described below, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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[2] A collective bargaining agreement between the Employer and the Union covering the petitioned for unit described above and effective from August 3, 2001 through August 31, 2004 was admitted into evidence.
[3] A brief filed by the Union was fully considered.
[4] The Employer, a New Jersey corporation, is engaged in the operation of a nursing home providing long-term care and related services at its Pittstown, New Jersey facility, the only facility involved herein.
[5] The parties stipulated and I find that the Union is a labor organization within the meaning of the Act.

> **All full-time and regular part-time nurse's aides, dietary workers, housekeeping employees, laundry employees and activities aides who work at least 20 hours or more per week, employed at the Employer's Pittstown, New Jersey facility, excluding outside sales representatives, executive, administrative, managerial and confidential employees, registered nurses, licensed practical nurses, office clerical employees, seasonal employees, temporary employees, casual on-call personnel, cooks, maintenance employees, managers, guards and supervisors as defined in the Act and all other employees.**[6]

II. CONTENTIONS OF THE PARTIES:

The Union contends, contrary to the Employer, that there is a collective bargaining agreement in effect between itself and the Employer, thus barring a question concerning representation and requiring a dismissal of the petition.

III. BACKGROUND:

A. Contract Bar

The record discloses that the Union has represented the unit of employees described above and was a party to a collective bargaining agreement effective from August 3, 2001 through August 31, 2004. This collective bargaining agreement contained an automatic renewal provision which the Union asserts extended the agreement upon its expiration.

I take administrative notice that on January 31, 2006, I dismissed a charge filed by the Union in Case 22-CA-27154; therein, I determined, *inter alia*, that the above collective bargaining agreement did not renew itself as of September 1, 2004. In this regard, I found in the unfair labor practice proceeding that although neither party had notified the other of its intent to terminate or modify the collective bargaining

[6] The unit description is in accord with the stipulation of the parties and the collective bargaining agreement noted above. There are apparently approximately 60 employees in the unit, although the Union asserts without foundation that the unit may be larger.

agreement, as required by it, nonetheless, the investigation also revealed and it was undisputed that prior to the contract's expiration, the parties engaged in negotiations for a successor agreement and reached agreement on all terms except health and welfare contributions. Documentary evidence established that these negotiations were conducted and nearly concluded on August 12, 2004, prior to the effective date of automatic renewal on August 31, 2004. The Board recognizes that even when timely notice is not given, a party, by its actions, may waive the notice requirement by agreeing to bargain. *Allied Industrial Workers of America*, 285 NLRB 651 (1987). Thus, I concluded that by these actions the parties waived the notice requirement and the contract did not renew itself on August 31, 2004. Therefore, I conclude herein for the same reasons that no current contract is in existence.

B. Timeliness of Petition

The petition was filed by the Employer on June 29, 2004; it is therefore not timely with respect to either the open period for filing petitions or after expiration of the contract. Thus, the petition was untimely when filed.[7] In this regard, I note that the collective bargaining agreement was effective from August 3, 2001 through August 31, 2004, a period in excess of three years. The Board has held that a contract having a fixed term of more than three years operates as a bar for as much of its term as does not exceed three years. *General Cable Corp.*, 175 NLRB 1035 (1969). The three year period during which a contract is operative as a bar runs from its effective date. *Benjamin Franklin Paint Co.*, 124 NLRB 54 (1959).

[7] In health care cases as here, a petition is timely filed if it is filed not more than 120 days nor less than 90 days prior to the terminal date of the contract or after the contract's termination date. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

I find in these circumstances, where the collective bargaining agreement was set to expire by its terms on August 31, 2004, the practice of the Board is to exercise its discretion and order an election, despite a finding that the petition may have been untimely filed. In this regard, the Board has held that "a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the Board's decision issues on or after the 90th day preceding the expiration date of the contract." *Deluxe Metal Furniture Company*, 121 NLRB 995, 999 (1958); *Royal Crown Cola Bottling Co.,* 150 NLRB 1624, 1625 (1965); *Westclox Division of General Time Corp.*, 195 NLRB 1107 (1972); *The Mosler Safe Company*, 216 NLRB 9, 10 (1974). [8] Like here, in *Maramount Corp.*, 310 NLRB 508, 512 (1993), even though the petition may have been premature as originally filed, the petition remained pending during the relevant window period and therefore no contract bar was found. *Royal Crown Cola Bottling Co.*, above. This is the situation here. Accordingly, it is appropriate to direct an election in this matter.

IV. DIRECTION OF ELECTION:

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or

[8] Such a hearing on an otherwise premature petition will only be directed, as here, if an investigation conducted on the basis of information furnished by the Petitioner establishes reasonable grounds for believing that the existing contract is not a bar. *Deluxe Metal Furniture Company*, above at 999.

temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **District 6 International Union of Industrial Service, Transport And Health Employees.**

V. LIST OF VOTERS:

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties

to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before**, March 14, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW:

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by**, March 21, 2006**.

Signed at Newark, New Jersey this 7th day of March 2006.

/s/ Gary T. Kendellen

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Gary T. Kendellen, Director, Region 22
National Labor Relations Board
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